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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 673.

ROY L. WILLIAMS et al.,
Petitioners,

vs.

THE COOPERATIVE FARM CHEMICALS ASSOCIATION et al.,
Respondents.

## PETITIONERS' REPLY BRIEF

**In Support of Petition for Writ of Certiorari to the Supreme Court of the State of Kansas.**

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**In Support of Petition for Writ of Certiorari to the Supreme Court of the State of Kansas.**

### ARGUMENT.

I. THE INJUNCTIONS ENTERED BY THE TRIAL COURTS PRESENT FINAL JUDGMENTS IN A JUSTICIABLE CAUSE.

Respondents' answering brief to the petition for certiorari indicates that portions of the proceedings, subsequent to the mandate of the Kansas Supreme Court, have been

filed as a part of the record in this Court. To permit full consideration of the significance of such proceedings, Petitioners have, pursuant to Rule 21 (3), filed a certified copy of *all* proceedings occurring subsequent to the mandate of the Kansas Supreme Court.[1]

**A. The injunctions entered by the trial courts, though temporary in form, are "final" when tested against the policy of 28 U. S. C., Sec. 1257.**

That state court judgments lacking in finality will not be considered here is, of course, conceded. Nor do Petitioners dispute the proposition that temporary injunctions are, generally speaking, non-final within the meaning of 28 U. S. C., Sec. 1257. But "it is no longer the rule that the face of the judgment is determinative of whether it is final." *Gospel Army v. Los Angeles*, 331 U. S. 543, 546.

Congress, in enacting 28 U. S. C., Sec. 1257, limited this Court's power to review state court judgments "lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions." *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 381. When tested against this policy, the injunctive decrees now before the Court are final.

Respondents, subsequent to the mandate of the Kansas Supreme Court, filed with the District Court for Douglas County a document entitled "Dismissal." As the Respondents concede (Resp. Br., pg. 3), the trial court treated it as a motion to dismiss, and on February 4, 1960, a hearing on the motion was held. During the course of the hearing the

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[1] Since consideration of the post-mandate proceedings may be dependent upon a petition for writ of certiorari directed to the Kansas Supreme Court *and* to the District Courts for Douglas and Montgomery Counties, Petitioners ask that the petition be so viewed.

following colloquy between the court and counsel for the Respondents took place:

> "The Court: Before you quit I would like to ask one question. In your preliminary remarks or statement I got the impression that it was your interpretation of the case that it was [not][2] submitted on its merits. I think in a limited sense that may be a true statement, but in the overall sense I think the case was submitted on the merits on an agreed statement of facts, to which statement of facts there was a demurrer to the evidence. To that extent I construe it as a case being submitted on merits.
>
> "Mr. Spencer: On an application for temporary injunction.
>
> "The Court: Under the pleadings.
>
> "Mr. Spencer: That is correct, I will agree to that" (R. 274).

A review of Kansas precedent demonstrates the accuracy of the trial court's impression that the case was "submitted on the merits."[3]

In Kansas, as elsewhere, "the nature of the order is not determined by its name or label but by its effect." *Allen v. Gilliten*, 156 Kan. 550, 552, 134 P. 2d 631, 633. In this case, comprehensive factual stipulations were agreed upon

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[2] Judging by the transcript of the hearing, the court reporter was quite hard of hearing.

[3] Respondents' motion to dismiss was taken under advisement by the District Court for Douglas County. No ruling had been issued at the time this brief was filed.

Copies of correspondence between counsel indicating that Respondents desire to hold their motion for dismissal of the proceedings in the District Court for Montgomery County in abeyance, pending this Court's ruling on the petition for certiorari, have been filed with the Clerk. This correspondence is not a part of the record and is therefore submitted only in connection with the issue of mootness.

and a demurrer to this evidence was submitted. As in *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 73-74, the factual stipulations are binding and preclude a meaningful relitigation of the cause. *Broyles v. Order of United Commercial Travelers*, 155 Kan. 458, 459, 126 P. 2d 212, 213. Since all of the legal and factual issues in this case have been resolved, so far as the Kansas courts are concerned, an additional "trial" would amount to nothing more than forensic exercise. Finality, not ritual, is the test of reviewability.

**B. The injunction proceedings have not been mooted by either the Petitioner Union's decertification as bargaining agent or by Petitioners' observance of the injunctive decrees.**

Respondents' brief asserts that it was "stipulated" in the trial court that the dispute between the parties had been "settled" (Resp. Br., pg. 5). The record does not support this assertion. Petitioners agreed that the Union had been decertified following a National Labor Relations Board election. However, this hardly constitutes the settlement of a dispute.

The affidavit of Petitioner Williams[4] clearly demonstrates that, while the *reason detre* of the dispute is now organizational rather than contractual, the controversy is none the less real. And since it was the *situs* of the picketing rather than the object of the picketing which rendered the activity unlawful under state law (R. 234), it is immaterial to inquire whether the Petitioners' object or purpose has changed during the course of the litigation.

[4] The original of this affidavit has been filed with the Clerk of this Court, and a copy has been served upon counsel for Respondent. The affidavit is outside the record and is submitted only in connection with the mootness issue.

The state law as construed below (R. 234) and the decree entered below (R. 267-268) prohibit Petitioners from picketing at the premises of the commonly-owned and managed corporations regardless of the object which the Petitioners seek to achieve.

Respondents alternatively assert that the failure of Petitioners to picket during the pendency of this litigation demonstrates its mootness. An *ex parte* restraining order, issued on May 9, 1958, was in effect until October 3, 1958, when the trial court's judgment sustaining Petitioners' claim of pre-emption was rendered. The injunction was reinstated pursuant to the mandate of the Kansas Supreme Court on December 24, 1959. Petitioners' respect of these orders does not evidence mootness. *Bakery Sales Drivers Union v. Wagshal*, 333 U. S. 437, 442.

As a result of an election held on February 9, 1959, the Petitioner Union was decertified by the National Labor Relations Board (Williams' affidavit). The election bar rule precluded the Petitioners from invoking the NLRB's election procedures prior to February 9, 1960, and the NLRB's Curtis Bros. doctrine (119 NLRB 232, rev'd . . . F. 2d . . ., *cert. granted*, 359 U. S. 965) condemned even primary picketing during that period. But for the state decree presently in effect, Petitioners would have been permitted to picket in support of either organizational or recognition purposes upon the expiration of the one year period following the conduct of the election. See: National Labor Relations Act, as amended, Section 8 (b) (7) (B), 29 U. S. C., Sec. 158 (b) (7) (B). Certainly, if, as *Wagshal* teaches, obedience to a court decree does not moot a cause, respect for the national labor policy, as declared by the NLRB, should not be considered evidence of mootness.

## II. THE DAMAGE JUDGMENTS ENTERED BY THE TRIAL COURTS, WHICH WERE REVERSED BY THE KANSAS SUPREME COURT, INDEPENDENTLY SUPPORT THIS PETITION.

The damage judgments entered in favor of the Petitioners by the trial courts are set forth in Appendices E, pp. 41-42, and G, pp. 45-46, of the petition. As the petition indicates (pp. 6-7), Petitioners seek review of the single mandate of the Kansas Supreme Court which controls the disposition of the proceedings in the two trial courts. Since the single mandate of the Kansas Supreme Court is properly before this Court, it is submitted that those portions of the mandate reversing the award of damages in favor of Petitioners are necessarily here for this Court's review. To the extent that a separate specification of error directed to that part of the mandate reversing the award of damages may be required, Petitioners move the Court to treat this brief as such specification.[5]

### A. The damage judgments present federal questions reviewable here.

Under familiar principles, Kansas permits recovery of the *reasonable* value of attorneys' fees incurred in defending an application for an injunction. Annot., Injunction Bond—Attorneys Fees, 164 A. L. R. 1088, 1099-1100. Both the judgments entered by the trial courts (Pet., pp. 41, 45)[6] and the decisions of this Court (*e. g., Springfield v. Crawfordsville State Bank*, 231 U. S. 541, 542) demonstrate that a judgment for a reasonable attorneys' fee is an award of damages. Such damage awards, in an appro-

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[5] A signed copy of the brief has been filed with the Clerk. Counsel for Respondent have been specifically advised of the motion.

[6] E. g., the judgment of the District Court for Douglas County provides (Pet., pg. 41): "that the damages of attorney fees in the amount of $500 should be assessed."

priate case, are cognizable here. *Tullock v. Mulvane*, 184 U. S. 497, 509-514. This is such a case.

The controlling legal inquiry to be made in this case is whether the doctrine of federal pre-emption bars the exercise of state jurisdiction. The District Courts for Douglas and Montgomery Counties answered this question affirmatively and therefore awarded damages, totaling $800, against the Respondents. On appeal, the Kansas Supreme Court answered the question in the negative and, accordingly, reversed the award of damages. Thus, here, as in *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483, the determination of a federal question is dispositive of the litigation. In these circumstances, the damage issue is federal in character and reviewable here. *Cf. Fox River Paper Company v. Railroad Commission*, 274 U. S. 651, 653-654.

B. **Since the damage judgments are independently cognizable here, a finding that the injunctive aspects of the case are either moot or unripe for review is not determinative.**

Should the Court conclude that the injunctive aspect of this litigation is either moot or reposed in a non-final limbo, it is nevertheless submitted that the damage judgments adequately and independently support the petition. Respondents do not, and indeed could not, contend that the damage judgments lack finality.

The alleged mootness of the injunction proceedings is not an obstacle to a review of the damage issue presented in this case. Petitioners seek "a monetary award"; hence, "the case is a continuing controversy." *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 459.[7]

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[7] *Oil Workers v. Missouri*, ... U. S. ..., relied upon by Respondents (Resp. Br., pg. 7) is therefore inapposite. Were this Court to reverse the judgment below, Petitioners would be entitled to recover at least $800 damages.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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